SUPREME COURT, U.S.
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MICHAEL RODAK, JR.

No. 73-727

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROY GENE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court below applied the wrong standard of proof in determining the sufficiency of the evidence to support his perjury conviction.

1. Following a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of perjury, in violation of 18 U.S.C. 1621. He was sentenced to two years' imprisonment, one and a half years of which were suspended; he was placed on probation for two years. The court of appeals affirmed (Pet. App.).

On July 31, 1970, petitioner testified before a federal grand jury in the Central District of California (R.T. 174).[1] The essence of his sworn testimony, upon which the indictment was predicated and for which he was convicted, was that he did not know that any or all of a $200,000 finder's fee for a loan sent to Pacific American Investments (hereafter "Pacific American") in Hong Kong was returned to the United States by one Leonard Bursten (Grand Jury Tr. 24-25).

The trial evidence showed that Messrs. Winters and Bulasky, owners of the Beverly Hillcrest Hotel in Los Angeles, sought Bursten's help in obtaining a $3,500,000 loan from the Teamsters Pension Fund in Chicago, Illinois. Bursten informed them that a $250,000 fee would have to be paid to facilitate the loan, and that petitioner would counsel them in their dealings with the Teamsters (R.T. 155-156, 177-178). In December 1966, petitioner accompanied the hotel owners to Chicago, where they were to present their request for the loan to the trustees of the Pension Fund. Petitioner instructed them that a Mr. Cal Kovens would look after them at the trustees' meeting (R.T. 155-156, 166). Prior to the meeting, the hotel owners were told by petitioner and Bursten that they would not be asked about the finder's fee (R.T. 188). Mr. Kovens, who appeared to be in

[1] "R.T." refers to the Reporter's Transcript of the trial proceedings, copies of which are being lodged with this Court.

charge of the order of appearance before the trustees, escorted them to the meeting (R.T. 166).

Through letters in September and December 1967, the Beverly Hillcrest Hotel agreed that of the $250,000 finder's fee, $50,000 would be paid to petitioner and $200,000 would be paid to Pacific American in Hong Kong[2] (R.T. 146, 159-161, 181). Mr. Woltag, the managing director of Pacific American and Pasan, testified that he had played no role in assisting the hotel owners to get their loan (R.T. 141, 146-147).

Prior to the closing of the loan on December 20, 1967, attorneys for the Pension Fund found out about the finder's fees which were being paid by the hotel (R.T. 188-189, 198). The hotel owners were then instructed by petitioner to tell the attorneys that they were paying only a $50,000 finder's fee (R.T. 189, 200). A meeting was held on the morning of December 20, 1967, at the office of Mr. Martin Greene, counsel for the hotel owners, in which Mr. Greene, the hotel owners, and petitioner participated. Mr. Greene had become concerned about the finder's fees which were to be paid, since he had seen letters indicating three such fees—$50,000 to a Mr. Dorfman,[3]

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[2] Pacific American was a company that sold California land. Another company in Hong Kong, called "Pasan," was a holding company which acquired land for Pacific American to sell. Bursten formed the two companies and was an officer as well as a shareholder in one or both of them (R.T. 141, 148-149, 152). Petitioner was a shareholder in Pacific American (R.T. 141).

[3] Dorfman was apparently a person who was attempt-

$50,000 to petitioner, and $200,000 to an organization in Hong Kong. Petitioner assured Mr. Greene that the only finder's fee was the $50,000 to be paid to himself, and that the other two fees had to do with other proposed transactions which had fallen through (R.T. 209-216). The deal for the loan was closed later that afternoon. The next day, December 21, 1967, at petitioner's direction, Mr. Winters, one of the hotel owners, wrote two checks for $25,000 payable to petitioner and eight more checks for $25,000 payable to Pacific American (R.T. 183-184, 206-207). On December 22, 1967, Winters gave petitioner nine of the checks, holding back the tenth one, which was payable to Pacific American, until he received a release from the law firm of Covey and Covey, which had also worked on the loan application (R.T. 184). This last check was given to petitioner on January 5, 1968 (R.T. 185-186).

Howard Neidich, the government's primary witness, testified that he was in California in the summer of 1966 in connection with his responsibilities as president of Interstate Excavation Company. He was introduced to petitioner by Bursten, and he subsequently entered into two different business relationships with petitioner concerning construction work (R.T. 33-36). On December 8, 1967, Neidich, at the direction of Bursten, wrote a $25,000 check to petitioner, which petitioner told him was to be a

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ing to fund the loan through other sources which did not work out (R.T. 197).

good faith payment to Mr. Cal Kovens in relation to a loan being made by the Teamsters Pension Fund to the Beverly Hillcrest Hotel (R.T. 37-40). Petitioner and Neidich went to the bank together, and petitioner cashed the check, receiving the amount in $100 bills (R.T. 40-43).

Later in December 1967, petitioner told Neidich that the checks for the $200,000 finder's fee would be made out to Pacific American and would be wired to its account in Hong Kong through the Bank of America, and that Bursten would pick up the money there and bring it home (R.T. 47-50). Petitioner told Neidich that all or some part of the money would then be delivered to Kovens, who was instrumental in obtaining the loan from the Teamsters Pension Fund (R.T. 50-51).

On or about January 6, 1968, petitioner called Neidich and asked him to wire to Hong Kong the eight $25,000 checks made out to Pacific American (R.T. 44-46). Neidich received the checks from petitioner, took them to the Bank of America, and had them wired to the Pasan holding account in Hong Kong (R.T. 46-47). Mr. Woltag, the managing director of Pasan and Pacific American, received notice on January 6, 1968, that $200,000 had been received in their Bank of America account in Hong Kong. He was surprised and did not know why such a large amount had been remitted to the account (R.T. 142-143). Bursten then called him inquiring whether the $200,000 had been received (R.T. 144).

Bursten arrived in Hong Kong on January 7th or 8th and instructed Woltag to withdraw the money in $100 bills, which he did (R.T. 144). The $200,000 was placed in manila envelopes and put into a leather bag, which Woltag gave to Bursten. Bursten left Hong Kong that evening (R.T. 145).

On or about January 9, 1968, Neidich picked Bursten up in Vancouver, Canada, drove him to Seattle, and flew back with him on a plane to Los Angeles (R.T. 52, 54-56). Bursten and Neidich then met petitioner at the offices of the Beverly Ridge Estates, where both Neidich and Bursten had their offices (R.T. 52-53). Bursten and Neidich met privately in Neidich's office, and Bursten paid Neidich $25,000 in $100 bills, which were contained in a manila envelope. This was a repayment of the loan Neidich had made to petitioner a month earlier, with which petitioner had made a "good faith" payment to Cal Kovens (R.T. 56-58). Neidich and Bursten then went down to Bursten's office, where petitioner was waiting, and Neidich informed petitioner that Bursten had repaid petitioner's debt. The three of them then discussed the money Bursten had brought back from Hong Kong (R.T. 58). At the airport the next morning, in Neidich's presence, petitioner asked Bursten "Where is the package of money?", and Bursten handed petitioner a package, saying "Here's the money." Bursten said the package contained the money that he brought back from Hong Kong (R.T. 59).

In petitioner's grand jury testimony, he admitted

flying to Miami, Florida, on January 11, 1968, and delivering a package to Cal Kovens (Grand Jury Tr. 39-42, R.T. 239), but he denied that he knew that Bursten had brought the money back from Hong Kong.

2. Absent internal contradictions in the defendant's prior testimony (see 18 U.S.C. 1623), a conviction for perjury cannot rest solely on the testimony of a single witness. See *United States* v. *Wood*, 14 Pet. 430, 437. In addition to a single witness testifying as to the falsity of the testimony of the accused, there must be corroborative evidence substantiating that testimony. See *Weiler* v. *United States*, 323 U.S. 606, 610. Petitioner contends that the court below applied the wrong standard in determining the sufficiency of corroborative evidence in this case. This contention is without merit.

The testimony of Neidich was corroborated by the testimony of several other witnesses, and in part by petitioner's own testimony. Petitioner apparently contends that the corroborative evidence was insufficient in that it did not, standing alone, establish petitioner's guilt. There is, however, no such requirement. All that is necessary is that the corroborative evidence be independent of the single witness's testimony, *United States* v. *Freedman*, 445 F.2d 1220, 1226 (C.A. 2), and that it tends to establish the defendant's guilt, *Brightman* v. *United States*, 386 F. 2d 695 (C.A. 1).[4]

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[4] While the Sixth Circuit uses language from which a stricter standard of sufficiency for corroborating evidence

Corroborative evidence is an additional evidentiary requirement in perjury cases, but it does not alter or increase the burden of proof. Once the court has determined that the corroborative evidence substantiates the testimony of the single witness, it must then determine whether the evidence as a whole is sufficient to support the conviction; in this respect, perjury cases are no different from other criminal cases. Thus, the credibility of both the single witness and the corroborative evidence are matters for determination by the finder of fact. Accordingly, the court below was correct in applying the sufficiency-of-evidence test set out in *United States* v. *Nelson*, 419 F.2d 1237 (C.A. 9), to the evidence as a whole, and while it did not repeat the specific requirements in perjury cases with regard to corroborative evidence, it did state that the evidence met the strict standards of proof required in a perjury case (Pet. App. 3).

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could be inferred, that Circuit's requirement that the corroborative evidence be inconsistent with the innocence of the defendant is applied in substantially the same way as the standards in other circuits. Compare the facts of the instant case with *Hug* v. *United States*, 329 F. 2d 475 (C.A. 6), certiorari denied, 379 U.S. 818. It seems clear that the Sixth Circuit would have reached the same result in the instant case as the Ninth Circuit did.

Whaley v. *United States*, 362 F.2d 938 (C.A. 9), cited by petitioner, held only that if circumstantial evidence is relied on for conviction, such evidence must exclude every hypothesis except guilt. *Whaley* does not involve the question of corroboration of the testimony of a single witness.

A review of the evidence, set out above, clearly shows that the finding of the court below was correct. The testimony of Howard Neidich directly shows the falsity of petitioner's statements before the grand jury.[5] Neidich's testimony was corroborated in every respect by the independent testimony of Winters, Bulasky and Woltag, and by petitioner's own grand jury testimony; it leads to the inescapable conclusion that, as Neidich testified, petitioner received all or part of the $200,000 from Bursten, and, the next day, petitioner took the money to Florida to pay off Kovens for his help in getting the loan (see district court's findings, R.T. 279-286).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[5] While petitioner complains that the government did not call certain witnesses, notably Mr. Bursten (Pet. 6), petitioner could have called such persons; for whatever reasons, he chose not to do so.

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